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CANADA'S IMMIGRATION PROGRAM

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TABLE OF CONTENTS

Page

GENERAL 1
A. The Road to a New Act 1
B. Individual Cases Keep the Focus on Immigration 4
C. Recurring Policy Issues 4

IMMIGRATION AND DEMOGRAPHY: WHAT'S THE LINK? 5
A. Our Population 6
B. Our Ages 6
C. Our Labour Market 6

THE FRAMEWORK AND GOALS OF THE IMMIGRATION PROGRAM 9

CATEGORIES OF IMMIGRANTS 10
A. Immigration for Social Purposes – The Family Class 10
B. Immigration for Humanitarian Purposes – Refugees and Those in Refugee-like Situations 12
1. Selection of Refugees Abroad 12
2. The Refugee Status Determination System in Canada 13
3. Pre-Removal Risk Assessment 16
C. Immigration for Economic Purposes 17
1. Skilled Workers 18
2. Business Immigrants 19
3. Provincial Nominees 20
D. Issues 21
1. Long Processing Times 21
2. The Economic Success of Recent Immigrants 22
3. Immigration Consultants 23

LIVE-IN CAREGIVERS 24

JUDICIAL REVIEW 24

Page

REMOVALS 25

SECURITY CERTIFICATES 28

THE ROLE OF THE PROVINCES IN IMMIGRATION 30

SETTLEMENT AND INTEGRATION 31
A. Language Training 31
B. Immigrant Settlement and Adaptation Program – ISAP 31
C. Resettlement Assistance Program – RAP 32
D. The Host Program 32
E. Immigrant Loans Program 32
F. Issues 33
1. Geographic Location 33
2. Who Should Deliver Services? 34
3. Recognition of Foreign Credentials and Experience 34

TEMPORARY RESIDENT VISAS 35

APPENDIX 1. ANNUAL LANDINGS, 1962-2003
APPENDIX 2. 2004 IMMIGRATION PLAN
APPENDIX 3. GOVERNMENT-ASSISTED AND PRIVATELY SPONSORED REFUGEES (CHOSEN ABROAD), 1990-2002
APPENDIX 4. REFUGEE CLAIMS IN CANADA, 1980-2002
APPENDIX 5. FEDERAL SKILLED WORKER SELECTION GRID
APPENDIX 6. IMMIGRATION AND REFUGEE PROTECTION CASE LAW

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CANADA'S IMMIGRATION PROGRAM*

GENERAL

Canadian immigration and refugee protection issues present continual challenges and engender almost continual debate for lawmakers, public servants, and the public alike. Strict application of the legislation and regulations occasionally results in ordinary people hiding in churches in order to try to stave off deportation. Generous humanitarian impulses, as in the April-June 1999 reception of the Kosovo refugees, are offset by public distaste at those who arrive "illegally." In addition to the human factors, the former immigration law was extremely complex, the new law is untested, the field is litigious, and the resources of Citizenship and Immigration Canada were severely cut back in the mid 1990s.

We cannot insulate ourselves from international events. Events in far corners of the world often have repercussions here; closer to home, the effects of 11 September 2001 in the United States continue to reverberate.

A. The Road to a New Act

Problems in the program are certainly not new. The pre-1989 refugee status determination system had virtually collapsed by the fall of 1988 and it took 14 months for the controversial restructuring bill to pass through Parliament, resulting in increasing backlogs, confusion and public criticism of the system. In two reports in the 1990s, the Auditor General criticized certain aspects of the refugee system.

In 1992 and 1995, the *Immigration Act* was extensively amended. Each bill occasioned significant controversy on the part of interested parties: immigration and refugee

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* The original version of this Background Paper was published in January 1989; the paper has been regularly updated since that time.

lawyers; refugee advocates, many of whom work in settlement agencies; human rights groups; ethnic organizations; knowledgeable individuals, and others.

Beginning in the mid-1990s, there was a thorough and virtually continuous review of immigration and refugee law and policies. In early January 1998, a three-member advisory group to the Minister of Citizenship and Immigration released its report, *Not Just Numbers: A Canadian Framework for Future Immigration*. A year in the making, the work was based on wide consultation and presented a comprehensive review of all aspects of Canadian immigration law and policy.(1) The Minister of the day continued to consult the public and in January 1999 released a discussion document. *Building on a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Policy and Legislation* further contributed to the process of scrutinizing Canada's immigration system.(2) Comprehensive immigration legislation was widely expected, but was delayed.

In the summer of 1999, when four boats carrying Chinese migrants arrived off the shores of British Columbia, the debate over immigration and refugee law and policies became more widespread and intense. Much of the Canadian public did not like what it saw. Some 600 Chinese migrants, including a number of teenagers, arrived in leaky boats amid execrable conditions. None had documents, and most made refugee claims.

The Canadian public was taken aback. Much of the debate was similar to that in the mid-1980s when two boats of migrants had arrived off the East Coast. This time, however, sympathy was even scarcer because more was known about the criminal organization and recruitment of the migrants and the fact that for many the intended destination was not Canada, but New York City.

Although many Canadians called for the migrants to be returned to China immediately, the Minister of Citizenship and Immigration and those knowledgeable about the refugee system explained Canada's international and domestic commitments. They pointed out that the arrivals represented a tiny percentage of the number of individuals who arrive each year, mostly by air or across the U.S. border, to claim refugee status. Nevertheless, mass arrivals do frequently generate a backlash, especially when there are strong suspicions that those arriving are not true refugees.(3)

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(1) The report's authors were Susan Davis, Roslyn Kunin and Robert Trempe.

(2) The report can be found at http://www.cic.gc.ca/english/pdf/pub/LR-eng.pdf.

(3) Only a very small number of the refugee claims made by the 1999 Chinese boat arrivals were accepted.

105-07442/

The pressure on Citizenship and Immigration Canada, and the public debate, continued when, in April 2000, the Auditor General of Canada released a report to the House of Commons. Chapter 3 was entitled "Citizenship and Immigration Canada – The Economic Component of the Canadian Immigration Program."(4) The Auditor General found that immigration officers overseas were overwhelmed by their workload, and concluded that the Department did not have the resources to process the number of immigration applications required to reach its target levels.

The report also noted numerous examples of operational inefficiencies and poor administration, leading to doubts about the quality and consistency of the decisions regarding immigrant selection. Medical assessments were found to be inconsistent, and the legal tools to guide decisions on medical inadmissibility lacking. Information needed by visa officers to establish the admissibility of immigrants on criminality and security grounds was scant, and it appeared that the Department was open to fraud and abuse. Of equal concern, the Auditor General revealed that a number of the problems identified were long-standing; indeed, many had been reported in 1990, the Auditor General's last review of the Department's non-refugee work.

The Auditor General concluded that the deficiencies identified were seriously limiting the government's ability to deliver Canada's immigration program, and, consequently, its economic and social benefits. Moreover, the safety of Canadians could not be ensured due to insufficient control of our borders.(5)

The long-awaited legislation, Bill C-31, the Immigration and Refugee Protection Act, was tabled in the House of Commons in April 2000. Study of the bill by the Standing Committee on Citizenship and Immigration had just begun when an election was called and the 36th Parliament ended; thus, Bill C-31 died on the *Order Paper*. Its replacement, Bill C-11, was introduced in Parliament in February 2001, received Royal Assent on 1 November 2001, and came largely into force, along with an entirely new set of regulations, on 28 June 2002.(6)

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(4) The report can be found at http://www.oag-bvg.gc.ca/domino/reports.nsf/html/0003ce.html.

(5) In a report to Parliament in May 2003, the Auditor General followed up on the recommendations in the 2000 audit report. She found that a number of the difficulties previously noted had been dealt with by the new Act, and that progress had been made in many areas. Problems remaining included medical surveillance of refugee claimants, quality assurance for immigrant selection decisions at offices abroad, delays in upgrading computer systems, forms control, and reporting to Parliament. (The report can be found at http://www.oag-bvg.gc.ca/domino/reports.nsf/html/20030503ce.html.)

(6) S.C. 2001, c. 27.

Before the new Act was even through Parliament, however, the events of 11 September 2001 in the United States again focused attention on certain aspects of Canadian law and policy, in particular, the refugee determination system and border controls.[7] Although initial American suspicions that the terrorists had gained access to their territory through Canada were disproved, Canada came under pressure to heighten border security measures. On 12 December 2001, then Foreign Minister John Manley and U.S. Homeland Security Director Tom Ridge signed the Canada-U.S. Smart Border Declaration, which contained a 30-point plan designed to ensure the free movement of goods, while increasing security and combatting terrorism.[8] A number of the goals in the plan have immigration and refugee aspects that will take a significant time to come to fruition.

B. Individual Cases Keep the Focus on Immigration

Even when policy issues quiet down, high-profile immigration and protection cases are reported in the press regularly. A significant number involve criminality among immigrants and the difficulty of deporting such people. Other cases involve immigrants who are possible security risks. Still others concern nannies who have violated the conditions of their work permit or families with medical problems engaging the public, press and churches in order to try to avoid removal. In short, immigration issues in one form or another are almost continually in the media, and hence in the public eye.

C. Recurring Policy Issues

Many general questions relating to immigration and refugees continue to be relevant year after year. They include:

- Are immigration levels high enough? Are they too high?
- What kinds of immigrants are best for Canada?
- What settlement services are needed for new immigrants?
- How can immigrants' educational and training credentials be recognized fairly and quickly?

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(7) By that date, the bill was under consideration in the Senate.

(8) The Declaration and accompanying documents, including updates on progress, can be found at http://www.can-am.gc.ca/menu-e.asp?act=v&mid=1&cat=10&did=1247.

- What should be our policy for refugees? Does Canada accept more refugee claims than other countries?
- How should we respond to refugee claimants who arrive without documents?
- How can criminals and security risks be prevented from entering Canada?
- What is the best balance between facilitating the movement of people and exercising control of our borders?
- Why do we seem to have such trouble removing people who have no right to be in Canada and what can be done about it?
- Should we continue to deport people to countries they do not know when they have spent most of their lives in Canada?
- How can Canada fulfill its international humanitarian commitments and provide leadership?
- In a post-9/11 world, how do we defend our security interests without unduly limiting individual rights? In the wake of the case of Maher Arar, should there be safeguards or protocols on the use of information shared with other governments?

Needless to say, this paper does not answer these questions. The intention is rather to provide a general framework whereby readers may become aware of immigration issues, the immigration program and background information for what can be a very complex area of law, and government policy and administration.(9)

IMMIGRATION AND DEMOGRAPHY: WHAT'S THE LINK?

Recently, the question of immigration has been linked closely with Canada's future as the implications of demographic changes become clearer. Given our country's relatively low birth rate and aging population, many inside and outside government have seen immigration – and greatly increased immigration – as essential both to stave off severe labour market dislocation and to protect social programs. Others are not so sure. The implications of our demographics and the current debate surrounding it thus deserve a special section of their own.

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(9) Citizenship and Immigration Canada maintains a helpful Web site at http://www.cic.gc.ca. For non-governmental organizations, the Canadian Council for Refugees, an umbrella organization, is a useful starting place: http://www.web.net/~ccr/.

Some key demographic facts in brief are as follows.

A. Our Population

- Canada's fertility rate was 1.51 in 2001, up from a record low of 1.49 in 2000. While lower than that of the United States, it is higher than that of a number of European countries.(10)
- At current fertility rates, deaths are predicted to exceed births in Canada in 20-25 years.(11) At that point, immigration would account for all population growth. In the United States, the point at which deaths exceed births is not expected to be reached for some 50 years.

B. Our Ages

- Canada's large "baby boom" generation, those 10 million Canadians born in the 20 years between 1947 and 1967, will begin entering their 60s, and start retiring, in some 4 to 9 years.
- The working-age population is aging; from 1991 to 2001, the population aged 45 to 64 increased by almost 36%.(12)
- Our median age is now over 37 years.(13)

C. Our Labour Market

- In the first half of the 1990s, immigration accounted for 70% of net labour force growth.(14)
- By 2011, immigration is expected to account for all net labour market growth.(15)
- Studies already reveal labour shortages in nursing, education, and the skilled trades.(16)

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(10) Statistics Canada, *The Daily*, "Births," 11 August 2003, available at http://www.statcan.ca/Daily/English/030811/d030811a.htm. The "fertility rate" is a hypothetical figure that represents the total number of children born on average to each woman aged 15 to 49. Canada's rate fell from 3.8 in 1960 to 1.65 in 1987, rising slowly to about 1.7 in 1992, but hovering around 1.6 for the rest of the 1990s. Replacement level for Canada is considered to be 2.1 children per woman. The last year that this level was achieved was 1971.

(11) Statistics Canada, *The Daily*, "Trends in Canadian and American Fertility, 1980-1999," 3 July 2002, available at www.statcan.ca/Daily/English/020703/d020703a.htm.

(12) Statistics Canada, 2001 Census, Release 2, 16 July 2002.

(13) *Ibid.*

(14) Canada's Innovation Strategy, *Knowledge Matters: Skills and Learning for Canadians*, Section 5.1, available at http://www11.sdc.gc.ca/sl-ca/home.shtml.

(15) *Ibid.*

(16) House of Commons, Standing Committee on Citizenship and Immigration, *Competing for Immigrants*, June 2002, p. 2.

Assessing the foregoing, many take the view that Canada's immigration levels should remain high, or increase significantly – to 1% of the population or even much more. Some focus generally on overall demographic needs, while others stress labour market requirements, but the result is the same – support for high, and higher, levels of immigration, to deal with both immediate needs and the longer-term outlook.

A contrary view exists. Its proponents advance a number of different arguments. For example, they point out that although immigration can affect the labour market, and the total population, it has little effect on the age structure of the population. Only a higher fertility rate can significantly affect this.(17) Nor can immigration "solve" the problems of an aging population. Demographers point out that Canada's baby boom generation has actually delayed the aging of our population relative to Western European countries and Japan. We will not reach the age structures of some European countries for approximately 20 years, so we have time to adjust our pension and medical systems and learn from their experience.

Some demographers downplay the view that we have existing labour market shortages, or will have in the future. They point to a current relatively high unemployment rate, and the fact that the baby boomers' children will be entering the labour market as the boomers retire – labour shortages possibly in 20 years, but nothing to worry too much about at the present time. They also point out that there is little correlation between the size of a country and its economic well-being.

Some environmentalists point out the link between population growth and environmental degradation and resource depletion, and question the basic assumption that Canada's population needs to continue to grow. They note that the current pattern of immigrant settlement largely in Canada's three major cities leads to more urban congestion. Although any suggestions that potential immigrants should be compelled in some way to live in the less populated areas has to date been controversial, ways to encourage immigrants to do so continue to be explored.

Others point out that the notion that older Canadians will be "dependent" on younger workers is false. They note that the health of those over 65 is better than in the past, that seniors pay taxes too, and that many make economic and non-economic contributions to society. Our view of "old age" is outdated, they argue.

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(17) Health and Welfare Canada, *Charting Canada's Future, A Report of the Demographic Review*, 1989, pp. 19-21.

It has been pointed out, and acknowledged by the federal government, that immigrants arriving in the 1990s were initially less successful economically than previous arrivals, despite having higher levels of education, on average, than Canadians.[18] There may be numerous reasons for this situation, including: inadequate systems for evaluating foreign education and training credentials and providing for any necessary upgrading; a reluctance of Canadian employers to hire workers without Canadian experience or less than complete language fluency; and negative attitudes on the part of some employers toward hiring newcomers, particularly visible minorities. Some have argued that, until these problems are ironed out, it would be fairer to potential immigrants to keep immigration levels modest, or at least provide better information to prospective immigrants.

It should be noted that there is some evidence that immigrant performance did begin to improve in the mid-1990s but, according to the Organisation for Economic Co-operation and Development (OECD), this recovery has been tentative.[19]

Finally, some commentators note that the immigration program costs money. At the federal level, significant resources are required for overseas and inland processing, for settlement and integration programs, and for the additional enforcement activities that higher immigration levels could be expected to bring. Such costs are only partly offset by user fees charged to applicants. Provincially, many newcomers require settlement services and their children typically need second-language instruction in English or French. Some immigrants need social assistance, and there are the medical services to which all permanent residents are entitled.

So, is there a "right" immigration level for Canada? Clearly any such discussion must cover demography, economics, public finance, and absorptive capacity (particularly of our large cities), and must also be politically sensitive. Policy makers need to avoid overselling immigration as a complete solution to demographic trends. At the same time, where significant labour market shortages appear, the immigration program should ideally be nimble enough to assist in helping to alleviate them. Meanwhile, Canada has a significant advantage, shared by the United States, in that our populations are younger than those of other Western democracies and Japan, and can learn from their experiences.[20] We also have another advantage over those

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(18) In the long term, however, immigrants still outperform native Canadians.

(19) OECD, *Economic Survey of Canada*, 2003.

(20) It may be noted, however, that the United States has a significantly higher fertility rate than Canada.

countries. In contrast to their current general antipathy to immigration, our tool kit for addressing the changes our aging population will bring includes a sophisticated immigration program, whatever the actual levels may be from time to time.

THE FRAMEWORK AND GOALS OF THE IMMIGRATION PROGRAM

The foundation of Canada's immigration program is the *Immigration and Refugee Protection Act*,[21] the regulations that accompany it,[22] and the decisions of the courts and the Immigration and Refugee Board. Also important are the various components of the Immigration Manuals, which contain extensive guidelines and instructions to officials administering the program, although the Act or regulations would prevail in the case of conflict.[23]

Current demographic questions aside, why does Canada have an immigration program, let alone one that welcomes more net immigrants per capita than any other country in the world?[24] Three purposes are generally cited in answer to this question, to which we may add several more. Each purpose results in a specific component of the program.

> **A. The social component** – Canada facilitates family reunification and permits the nuclear family unit (spouses, dependent children) to immigrate with principal applicants. Objective 3(1)(d) of the Act states the objective of "…see[ing] that families are reunited in Canada."
>
> **B. The humanitarian component** – As a signatory to the *Convention relating to the Status of Refugees* and the *Convention Against Torture*, Canada hears and decides claims for protection made by people arriving spontaneously in the country. It also assists people overseas by accepting for permanent residence government-assisted and privately sponsored refugees and others in need of protection. Objectives 3(2)(b) and (d) of the Act state the goals of "…fulfil[ling] Canada's international legal obligations with respect to refugees and affirm[ing] Canada's commitment to international efforts to provide assistance to those in need of resettlement"; and "offer[ing]safe haven to

(21) S.C. 2001, C. 27. In force, for the most part, on 28 June 2002.

(22) *Immigration and Refugee Protection Regulations*, SOR/2002-227, in force (with some exceptions) on 28 June 2002.

(23) The Manuals may be found on-line at http://www.cic.gc.ca/manuals-guides/english/index.html.

(24) Net immigration takes into account those who leave the country, as well as those who arrive. The other countries with significant immigration programs are the United States, Australia and New Zealand; Israel is usually treated as a special case.

persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment."

C. The economic component – Canada wishes to attract skilled workers and business immigrants who will contribute to the economic life of the country and fill labour market needs. Objective 3(1)(c) states the goal of "… support[ing] the development of a strong and prosperous Canadian economy …."

To the above principal objectives of the program may be added several other factors. Canada sees itself as a nation of immigrants. Immigrants at the turn of the 20th century settled the West; after World War II they arrived in our largest cities and contributed substantially to building those cities' physical infrastructure and enriching their cultural life. In accepting thousands of Indochinese refugees in 1979-1980, Canadians became more attuned to the plight of refugees and their needs. Thus, our history has made Canadians generally more accepting of immigrants and refugees, and of the multicultural society that results. These views are less common in countries without that history.(25)

CATEGORIES OF IMMIGRANTS

A. Immigration for Social Purposes – The Family Class

As mentioned above, one of the objectives of Canada's immigration program is to reunite families. Family class immigration reached a high of 110,563 in 1993, before beginning to decline. The level in 2004 is 52,500-55,500 family members.(26) It should be noted, however, that those figures do not include family members who accompany a principal applicant to Canada upon initial immigration; nor do they include those dependent family members of refugees selected abroad and who may be processed as part of the same application for permanent residence for up to one year. Thus, the family component of the immigration program is larger than the figures for the "family class" would suggest, and the economic program (in the sense of the number of individuals actually selected for economic reasons) is smaller.

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(25) It should be noted that, with the exception of the Western movements 100 years ago, Canadian immigration in the 20th century, and continuing today, has been primarily an urban phenomenon.

(26) These figures are broken down into spouses, partners and children (42,000) and parents and grandparents (10,500-13,500).

The relationships that are part of the family class are found in the following table:

Members of the Family Class
• Spouses, common-law partners, and conjugal partners.[27]
• Dependent children.[28]
• Children intended for adoption.
• Parents, grandparents, and their dependent children.
• Brothers, sisters, nephews, nieces or grandchildren if they are: orphaned, not a spouse or common-law partner, and under 18.
• Any relative if the sponsor is alone in Canada and has none of the above family members to sponsor.

There are some significant changes to the family class in the *Immigration and Refugee Protection Act* as compared to the former Act:

- Children under 22 are now in the family class, as opposed to under 19 in the recent past.
- Individuals are able to sponsor at age 18, down from 19.
- Dependent children now include children under legal guardianships.
- Same- and opposite-sex common-law couples are now formally recognized and accorded rights, as are conjugal partners.
- Spouses, common-law partners, conjugal partners and dependent children are exempt from the health requirements related to excessive demand.
- Spouses and common-law partners with temporary status in Canada may be sponsored for landing in Canada as part of a defined class.
- Fiancé(e)s are no longer a separate group, but may be sponsored if they are conjugal partners.
- There are streamlined methods of recovering payments upon sponsorship default.
- There are more rules excluding people from sponsoring family, including those in default of court-ordered family support payments, and those convicted of specified family-related crimes.
- The duration of the sponsorship period for spouses and common-law partners is now three years, and varies for children depending on the age or situation of the child.

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(27) A common-law partner of a sponsor is a person who is cohabiting in a conjugal relationship with the sponsor and the cohabitation has been for a period of at least one year. If a conjugal relationship has existed for at least one year but without cohabitation because of persecution or penal control, the common-law relationship is still considered to exist. A conjugal partner of a sponsor is a person who resides outside of Canada who has been in a conjugal relationship with a sponsor for at least one year.

(28) Children under 22 who are not a spouse or common-law partner at the relevant time; children 22 and over who are full-time students or dependent on their parents by reason of a physical or mental disability.

B. Immigration for Humanitarian Purposes – Refugees and Those in Refugee-like Situations

1. Selection of Refugees Abroad

For many years, Canada has fostered the resettlement of refugees and those in refugee-like situations through private and government sponsorships. Beginning in June 2002, there is a requirement for either a sponsorship undertaking, or a referral from an organization with an agreement with the government or from the United Nations High Commissioner for Refugees (although there are exceptions to that rule). There continue to be three categories of refugees or people in similar situations who may be admitted to Canada as permanent residents on humanitarian grounds. These three groups are:

- **The Convention Refugees Abroad Class** – Members of this class must be in need of resettlement (that is, there is no reasonable prospect now or in the near future of another permanent solution for them) and must meet the definition of Convention refugee: they must be outside their own country and have a well-founded fear of persecution for reasons of race, religion, political opinion, nationality or membership in a particular group. They may be sponsored privately or assisted by the government.
- **The Country of Asylum Class** – Members of this class must be in need of resettlement, be outside their own country and must have been, and continue to be, seriously and personally affected by civil war, armed conflict or a massive violation of human rights. There is no government sponsorship available for members of this class.
- **The Source Country Class** – Members of this class must be in need of resettlement and must be living in one of the countries that meet specified criteria. The list of countries is found in a schedule to the regulations.[29] Members must be seriously and personally affected by civil war or armed conflict in that country, must have been detained or imprisoned as a result of legitimately expressing themselves or exercising their civil rights, or meet the definition of Convention refugee.[30]

The Department has recently begun to select some refugees in groups, rather than processing them individually as has been done in the past. Some 900 refugees will be processed in this way over the next year. The first two groups selected arrived in early November 2003 from a refugee camp in Kenya. The groups, 30 Sudanese and 17 Somalis, were described as

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(29) Currently: Columbia, Democratic Republic of Congo, El Salvador, Guatemala, Sierra Leone and Sudan.

(30) Individuals in the last two groups are together referred to as "humanitarian – protected persons abroad" in the regulations. These humanitarian classes of people were first established in 1997.

"vulnerable" because of long-standing persecution in the camp.[31] Each group of refugees will be settled in the same community, in the hope that this will aid their integration.

2. The Refugee Status Determination System in Canada

The current refugee status determination system, and the Immigration and Refugee Board, began operation in 1989. The system was modified by legislation passed in 1992 and 1995, and further modified by the 2001 *Immigration and Refugee Protection Act*.

The refugee protection system must balance a number of factors. The law must embody the essence of the *Convention Relating to the Status of Refugees*, and its Protocol, which Canada signed in 1969. This requires signatories not to return people in any manner whatsoever to the frontiers of territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group or political opinion. The law must also reflect Canada's obligation under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Of crucial importance is the *Canadian Charter of Rights and Freedoms*. In 1985, the Supreme Court of Canada ruled that the Charter protected refugee claimants, and since that time there have been a number of important decisions affecting both the substance and procedures of immigration and refugee law.

At the same time, the law regarding refugee claimants must be stringent enough to counteract the perception that Canada does not have control of its borders. The government has long feared that, without control, support for all immigration and refugee programs would be endangered. Moreover, following the events of 11 September 2001, there has been significant pressure to put in place legal and administrative measures to respond to American fears that the United States is more vulnerable because of perceived weaknesses in the Canadian immigration and refugee protection system.

It is the government's view that control of the number of claimants in Canada is operationally essential as well, given the great number of potential claimants worldwide.[32] Thus, deterring the arrival of new claimants in Canada by a variety of means is an important

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(31) The Sudanese were persecuted because they were Christian, the Somalis because they were of a low caste.

(32) The number of claims to refugee status in Canada since 1980 is found in Appendix 4.

government goal.[33] The contradiction between Canada's having a refugee status determination system recognized as one of the best in the world, at the same time as strenuous attempts are made to block access to it, is real and irresolvable.

The previous *Immigration Act* contained only provisions relating to claims for Convention refugee status. Other grounds for protection had developed over time in the regulations and in administrative practice, and were required by the case law. The *Immigration and Refugee Protection Act* consolidated this broader focus, using the term "claim for refugee protection." Those who are successful are called "protected persons," being either "Convention refugees" or people "in need of protection." Jurisdiction over protection decisions is still divided between the Immigration and Refugee Board and Citizenship and Immigration Canada, but the Board's mandate was widened with the new Act.

Not everyone may make a claim to protection in Canada. Ineligibility criteria are applied by immigration officers (employees of Citizenship and Immigration Canada), and serve to exclude from referral to the Board those under a removal order and:[34]

- Claimants who have already received refugee protection in Canada, or in another country to which they can be returned;
- Claimants who have made claims previously that the Board has rejected, or who have made claims that were ineligible, withdrawn or abandoned;[35]
- Claimants who have been found to be inadmissible on grounds of security, violating human or international rights,[36] or serious or organized criminality. The ground of organized criminality is new as a specific category. Serious criminality is defined as either: (a) a conviction in Canada that carries a maximum punishment of 10 years or more, and for which a sentence of 2 years or more was imposed; or (b) a conviction outside Canada that, if committed in

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(33) Methods include: the imposition of a temporary resident visa requirement on individuals from countries that produce significant numbers of claimants; fines and charges for transportation companies that bring undocumented individuals to Canada; and a network of migration integrity officers (formerly immigration control officers) overseas who work with airlines to prevent those without valid documents from boarding aircraft.

(34) Very few claimants are found to be ineligible to proceed with their claims.

(35) Previously, a new claim could be made after the person was outside Canada for 90 days. Withdrawn claims had no such requirement. Now, after six months outside Canada, individuals may make only an application for a pre-removal risk assessment (see below).

(36) Previously, for a claimant to be ineligible on security or human rights grounds, the Minister had to be of the opinion that it would be contrary to the public interest to have the claim determined.

Canada, would carry a maximum punishment of 10 years or more, and the Minister is of the opinion that the person is a danger to the public;[37]

- Those who come, directly or indirectly, from a country designated by the regulations as a "safe third country" (although those words are not in the statute). The Act establishes criteria that must be applied when drawing up agreements with other countries regarding responsibility for determining claims, and for designating countries.

The events of 11 September 2001 provided an impetus for Canada and the United States to reach an agreement on which country would be responsible for examining claims in cases where the claimant entered from the other country.[38] By early July 2002 a draft was ready for consultation, and a final version was initialled at the end of August of that year. The Agreement embodies the general principle that claimants should have their claims examined by the first of the two countries in which they are physically present. It covers arrivals only at land border ports of entry. Another agreement, which the United States is reported to have insisted on as a condition of the main Agreement, will see Canada resettle up to 200 individuals at the request of the United States.[39]

Provisions governing the return of refugee claimants to a safe third country have been in the law since 1989, but were never implemented. With the coming into force of the U.S.-Canada Agreement, such return will become possible. Advocates for refugees in Canada (and in the United States) have always been staunchly opposed to the safe country provisions, and remain so. In addition to being opposed in principle – they argue that claimants should be permitted to choose their country of asylum – they feel that in a number of respects the Canadian system is fairer to claimants. They point to the higher rates of detention in the United States, detention that is often in the same facilities as criminals; to the restricted ability to work pending hearings; to time restrictions on making a claim; to an interpretation of the Refugee Convention that is often more restrictive than that in Canada; and to the wishes of francophone claimants. In addition, claimants in Canada have more access to legal aid, and to social assistance if needed.

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(37) Previously, the danger opinion also applied to convictions in Canada; now, a prison sentence of two years or more serves as a proxy for serious criminality in the Canadian context.

(38) A previous attempt had foundered in the mid-1990s.

(39) Article 9 of the Agreement states: "Both Parties shall, upon request, endeavour to assist the other in the resettlement of persons determined to require protection in appropriate circumstances." It has been speculated that these individuals will be those held in detention by the United States in areas other than its own territory.

Advocates predict potential logjams on both sides of the border as officials try to sort out whether the family relationships that would permit entry can be established. They also fear that because the Agreement applies only to those claims made at the border, claimants will resort to smugglers to get them into the country illegally. Once in Canada, they can make a claim without fear of being returned to the United States.

As of October 2004, both countries have pre-published their implementing regulations but the Agreement has yet to come into force.

3. Pre-Removal Risk Assessment

In addition to the refugee determination process, the Act now contains a process called the pre-removal risk assessment (PRRA) that permits most individuals to apply to specialized departmental officials for protection before actually being removed from Canada. For example, a claimant for refugee protection whose claim was rejected by the Immigration and Refugee Board may make a protection application on the ground that there is new evidence, or evidence that it was not possible or reasonable to provide at the original hearing.

In many cases, the test for risk is broad: the grounds in the Refugee Convention, the Convention on Torture, and the risk to life or the risk of cruel and unusual treatment or punishment. If protection is granted, those individuals are allowed to apply for permanent residence. In specified cases, including those inadmissible to Canada on grounds of security, organized or serious criminality, and violating human or international rights, the test is narrower, and a successful application results only in a stay of removal. In making the decision in these kinds of cases, questions relating to any danger to the public in Canada on criminal or security grounds, and the nature and severity of the acts committed by the person, must be considered.

The regulations establish strict timelines for making a protection application and submissions.[40] Although normally PRRA decisions will be made without oral hearings, the regulations establish the criteria as to when a hearing is required. The criteria relate to the person's credibility and go directly to the essence of the risk he or she claims to fear, and how central the person's evidence is to the protection decision.

The acceptance rate under the PRRA is only 3%.

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(40) Applicants who file their applications within the required time limits receive an automatic stay of removal. Applicants who do not, or who have filed subsequent applications, do not receive an automatic stay.

C. Immigration for Economic Purposes

In recent years, some doubts have been expressed about the size and efficacy of the explicitly economic side of the immigration program. The principal concerns expressed by commentators and the government arise from differing perspectives. First, as noted above, the retirement of the baby boom generation beginning in this decade has led to fears that our workforce will not be sufficiently large or skilled to enable us to maintain our standard of living and support the growing numbers of aging Canadians. At the same time, shortages of skilled and professional workers in some fields have already been identified, and are predicted to continue. Immigration is seen by many as at least a partial solution to these problems.

Another perspective notes that some economic immigrants in recent years have not been as successful economically as we, and they, would have hoped. The selection system was also criticized on the grounds that it was not objective or transparent, was open to manipulation and was too inflexible. As a result, for a decade Citizenship and Immigration Canada tried to devise a selection system that would respond better to Canada's needs, increase the likelihood of economic immigrants establishing themselves successfully, and increase the speed with which they could do so.[41] The revised system, described as a "human capital approach," came into force with the *Immigration and Refugee Protection Act*. There is a growing recognition, however, that until problems with the recognition of foreign credentials and training are solved, and employers become more willing to hire new immigrants, their settlement potential may well continue to be compromised.

Finally, perhaps as a result of the economic difficulties of recent immigrants, some have questioned whether the historical link Canada has made between economic prosperity and immigration is as strong as was previously thought.[42]

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(41) In November 1995, the Minister of Citizenship and Immigration had announced significant changes to the selection system. The proposals were strongly criticized and were dropped. The former "Occupations List," the tool to identify occupations currently in demand in Canada, had not been revised since 1997. In late 1998, the Department produced a research paper on the selection system, followed by two consultation papers (in 1999 and 2000). At every stage, consultation took place with provincial governments, industry groups, labour, regulatory bodies, immigration practitioners, and others with an interest in immigration matters.

(42) In contrast, the importance to developing countries of remittances from those who have emigrated is undoubted, typically exceeding direct foreign aid.

1. Skilled Workers

Skilled workers are independent immigrants selected to contribute to the economy through their education, skills and training. To qualify as a skilled worker, the applicant must have worked for at least one year within the last 10 in one of the specified skill types or levels as set out in the National Occupational Classification.[43] Essentially, this means they must have worked as a manager, or held employment requiring college, university or technical training; they must also show proof of a specified level of funds available to support themselves when they arrive in Canada, unless they have already arranged employment. The selection grid ("points system") then regulates their admission.[44] Officers retain the discretion to substitute their own assessment, positively or negatively, when they feel that an applicant's point total does not accurately reflect his or her potential for successful establishment.

The new selection grid awards points for education, language ability, employment experience, age, arranged employment and adaptability. Gone is the subjective assessment of "personal suitability," replaced by a menu of five objective factors (worth from 3 to 5 points), with a maximum of 10 points. Gone also is the arbitrary "levels control" factor, replaced by the ability of the Minister to change the pass mark as needed.

Eliminating the former occupations list from the selection grid means that the number of job categories is much greater. Critics of the new grid, however, feared that the stringent requirements of the various factors, combined with a pass mark of 75, would make it very difficult to immigrate to Canada as a skilled worker. In fact, in September 2003 the Minister announced that the pass mark would be lowered from 75 to 67; this change took effect on 1 December 2003.

One extremely contentious issue when the regulations for the new Act were first made public was the proposal that the new selection grid apply to all those in the existing inventory at the time the regulations were pre-published – a sizeable number. The final decision on the transitional rules was somewhat of a compromise, but many were still critical. Two lawsuits ensued, and the government fared badly. In September 2003, the government made the decision to permit all applicants in the inventory as of 1 January 2002 to be assessed under the

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(43) There is also the possibility of designating occupations as restricted should there be too many applicants and thus a possible disruption of the Canadian labour market.

(44) The selection system also plays a role in the selection of business immigrants, but to a much smaller degree. Note that Quebec has its own points system. See Appendix 5 for the selection grid.

former *Immigration Act* and, if they were not successful, also under the new Act. The new rules came into effect on 1 December 2003.

While attention tended to focus on the point system and its effects – whether the system was too stringent, what the pass mark should be, and whether individuals selected under it for their skills and abilities were able to make use of them once in Canada – another problem came to public attention. It involved undocumented workers, particularly in the construction industry, and particularly in the Greater Toronto Area. No one, including the government, has reliable figures on the number of individuals involved. Estimates range from "thousands" to "76,000" in Ontario alone, and up to 200,000 in the country as a whole. This particular population would seem to be composed largely of failed refugee claimants and people who have overstayed a temporary resident visa (visitor visa).

In November 2003, the government announced that it was developing a program to grant legal status to undocumented workers. It would begin with the construction sector in Ontario, but might be extended to other sectors and other provinces later. The government stressed that the program would not be an amnesty, because of the negative connotations of that word. It appears at the time of writing that the program may permit applicants to receive temporary resident visas, then after two years they would be able to apply for permanent residence. The standard criminal and security checks would apply.

The program is not without its critics. Some noted that the program benefited only a small number of undocumented workers, and only those with well-organized and well-connected labour and union groups to lobby for them. Non-unionized workers in service areas are not affected.

Meanwhile, the government has extended for another year a program (CREWS)[45] that brings up to 500 foreign construction workers to Canada annually on a temporary basis.

2. Business Immigrants[46]

There are three categories of business immigrant: investors, entrepreneurs and the self-employed.

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(45) The Construction Recruitment External Worker Services program.

(46) Quebec has different rules.

Investors are required to demonstrate that they have business experience according to an objective standard, and have accumulated a net worth of at least $800,000 by legal means. They must deposit $400,000 with the federal government, which distributes the money to participating provinces for investment. Investors receive no interest on the money, which they receive back in full after five years.(47)

Entrepreneurs are also required to demonstrate that they have business experience, by having managed and controlled a business at a defined level, and have accumulated a net worth of at least $300,000 by legal means. Their admission as permanent residents is conditional on owning at least one-third of a Canadian business (as defined in the regulations) and creating at least one full-time job for a person unrelated to them. They must actively participate in the management of that Canadian business for at least one year.

Both entrepreneurs and investors are subject to a modified selection grid, which awards up to 35 points for their business experience, and also awards points for age, education, language and adaptability.

Individuals may be admitted in the self-employed category if they will make a significant contribution to the cultural, artistic or athletic life of Canada,(48) or if they will manage a farm in Canada.

3. Provincial Nominees

Since 1998, there has been an effort by the federal and provincial governments, through the provincial nominee program, to meet the specific labour market or investment needs of individual provinces other than Quebec.(49) Eight provinces and one territory now have agreements under which they may nominate prospective immigrants using their own criteria.(50) The federal government then processes their applications, with most being accepted.(51)

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(47) The "cost" of the investment to the investor, therefore, is typically the amount it costs to borrow $400,000 for five years. The program has often been criticized as merely offering "passports for sale."

(48) They must either have been self-employed in cultural or athletic activities or have participated in such activities at a world-class level.

(49) See below for details regarding the Canada-Quebec Accord.

(50) They are: British Columbia, Alberta, Manitoba, Newfoundland and Labrador, New Brunswick, Prince Edward Island, Saskatchewan, Nova Scotia and Yukon.

(51) Statutory requirements relating to health, criminality and security apply.

Although the numbers are small at present,[52] the provinces are hopeful that this program will be a useful tool to meet their regional employment and demographic needs.

D. Issues

1. Long Processing Times

Over the years, the length of time it can take to process immigration applications has frequently been controversial. Delays have occurred in various parts of the world, and for differing reasons. Processing times have always been long in some places – India, for example, where demand has been strong, computerization has lagged, and documents must be very carefully checked.

In recent years, demand for immigration from Asia has been particularly strong.[53] At the same time, processing times have increased significantly, to the point where the posted time to an interview in Beijing for economic class applicants is over two years and the average processing time is listed as four years.[54] In Hong Kong, it currently takes business applicants some four years to proceed to an interview. In India, economic applicants can expect to wait nine months to have receipt of their application confirmed.

In the past, informed applicants could submit their applications at a processing post with lower volumes than in their home country (so-called "offshore processing"). As of May 2003, however, all applicants for permanent residence must apply in their country of residence or country of nationality, and this may be expected to exacerbate the situation in Asia.[55]

The number of immigration applications that can be processed at any post in a given period depends, in large part although not completely, on the resources dedicated to the task. Although the Asian posts have significant resources, it is clear that with more resources, more immigrants from that area could be accepted. Indeed, it is widely thought that *all* of the

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(52) The projected level for the provincial nominee program in 2004 is 3,500 immigrants.

(53) China has produced more immigrants to Canada than any other country since 1998. The student flow from China is second only to that from Korea. India has consistently produced the second-highest number of immigrants.

(54) It is widely believed that these figures are very optimistic.

(55) Residence must be legal and have been for a period of at least one year. Applicants from countries with no processing post must apply to the post specified by Citizenship and Immigration Canada.

people in Citizenship and Immigration Canada who process immigration applications could be redeployed to Asia and the planned immigration levels could still be met. Such a move, of course, is out of the question as it would be unfair to those in other areas of the world, and would eliminate the diversity of the immigrant flow.

Meanwhile, some criticize the Department for not devoting more resources to the area and point to the unfairness of a situation that, in effect, may make it impossible in any practical sense for a Chinese person to immigrate to Canada in the economic class. Without greatly increased resources, however, it is difficult to see how these difficulties can be resolved.

2. The Economic Success of Recent Immigrants

Recent research has confirmed what had been posited for some time: recent immigrants are not prospering to the same extent as previous immigrants. For example, data from the 2001 census show that the gap between the earnings of recently arrived immigrants working full-time and their Canadian-born counterparts has widened in the last 20 years. A Statistics Canada research paper entitled *Will they ever converge? Earnings of immigrant and Canadian-born workers over the last two decades*[56] indicates that between 1980 and 2000, the real earnings of recent male immigrants (defined as immigrants who had arrived in the five years prior to each date) not only decreased by 7% on average,[57] but the gap between their earnings and those of their Canadian-born counterparts more than doubled (from 17% lower in 1980 to 40% lower in 2000).

The gap between earnings of recently arrived female immigrants and those of Canadian-born women went from 23% to 45% between 1980 and 2000, although their incomes did not decline in real terms.

The immigrants most affected were those in the prime age groups; younger immigrants tended to fare no worse in earnings growth than their Canadian-born counterparts. This finding suggests that foreign work experience does not bring the economic returns that might be expected.

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(56) Mark Frenette and René Morissette, Statistics Canada, Analytical Studies Branch research paper series, October 2003, available at http://www.statcan.ca/english/IPS/Data/11F0019MIE2003215.htm.

(57) Within the group as a whole, there were significant differences. The real wages of male immigrants with no university degree fell by 14%; younger immigrants (but not older ones) with a university degree had a 3% increase in earnings.

Another Statistics Canada study also indicates that recent immigrants are faring less well than their predecessors. *The wealth position of immigrant families in Canada*[58] indicates that immigrant families who came to Canada before 1976, even those who came with fewer assets than those already in the country, are now wealthier than Canadians born in Canada. Their median wealth is $87,000 higher than the median wealth of comparable Canadian-born families. Moreover, the wealthiest immigrants are richer than the richest Canadians. In contrast, immigrant families who came to Canada between 1986 and 1999 had a median wealth of $46,000 *less* than that of comparable Canadian-born families.[59]

At the same time, low-income rates of immigrants since 1980 have increased steadily (although somewhat less in the late 1990s).[60] As the low-income rate of the Canadian-born population was declining (from 17.2% in 1980 to 14.3% in 2000), the low-income rate of recent immigrants (that is, those in Canada less than five years) increased from 24.6% to 35.8%, peaking at 47% in 1995. Even counting all immigrants as a group, the rate still rose from 17% to 20%. The increasing low-income rate was no respecter of age, family type, language, or education, although immigrants from Africa and Asia were more affected.

The implications for policy makers of the above data, and the trends they reveal, remain to be seen.

3. Immigration Consultants

In October 2002, the Minister of Citizenship and Immigration announced the creation of an arm's-length advisory committee to identify specific concerns and provide recommendations relating to the immigration consultant industry. The committee reported in May 2003; it advised that immigration consultants should be regulated and that Canadian embassies, consulates and high commissions should deal only with those individuals who are members in good standing of a Canadian law society or a new regulatory body for immigration consultants. In December 2003, regulations establishing a Canadian Society of Immigration

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(58) Xuelin Zhan, Statistics Canada, Research Paper, Analytical Studies Branch research paper series, November 2003. The paper can be found at http://www.statcan.ca/english/research/11F0019MIE/11F0019MIE2003197.pdf.

(59) A similar pattern was found for non-family units.

(60) Garnett Picot and Feng Hou, Statistics Canada, Research Paper, Analytical Studies Branch research paper series, June 2003. The paper can be found at http://www.statcan.ca/english/research/11F0019MIE/11F0019MIE2003198.pdf.

Consultants (CSIC) were pre-published. As of April 2004, people hiring a representative for an immigration application must engage either a member of a provincial or territorial law society or someone authorized as a CSIC consultant.[61] Applications submitted by any other immigration consultant are to be returned by Citizenship and Immigration Canada. Similarly, clients appearing before the IRB without an authorized representative are to be treated as though unrepresented.

LIVE-IN CAREGIVERS

The Live-in Caregiver Program has existed in its current form since 1994. Its purpose is to supply a need for caregivers that cannot be met by the Canadian labour force alone. The need is primarily for caregivers for children, but also for the elderly and disabled people. The caregivers live in the employer's home. Caregivers (largely women) come to Canada on temporary work permits; the incentive is that if they successfully complete two years of care giving within three years of arriving in Canada, they may apply for permanent residence.[62]

To qualify as a caregiver, applicants must have completed the equivalent of a Canadian secondary school education,[63] and have either trained for 6 months in a classroom setting or worked for 12 months in a care-giving position. They must also have a sufficient level of official language ability. There is also a requirement for a written contract of employment between employers and caregivers. This is an attempt by the government to respond to numerous reports of exploitation by employers; it remains a fact, however, that caregivers residing in their employers' homes are a potentially vulnerable group.

JUDICIAL REVIEW[64]

Any person who wishes to challenge a decision, a determination or an order made under the *Immigration and Refugee Protection Act*, whether made in Canada or abroad, may

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(61) Applicants who engaged an unregistered consultant and had an application in process as of 13 April 2004 may continue to use the services of their representative until April 2008.

(62) Caregivers must hold a work permit that specifies the employer; they may change employers, but must apply for a new work permit that reflects the changed employment.

(63) It is recognized that after they obtain permanent residence, most will move into the general labour market. Thus, a high school education is the minimum.

(64) For an overview of immigration and refugee case law, see Appendix 6.

make an application to the Federal Court. Leave, or permission, is required for the application to proceed. All applications for leave to apply for judicial review are decided by one judge, normally without personal appearance by the parties. There is no appeal from a decision on a leave application.

The grounds for judicial review are those set out in the *Federal Courts Act*. They are that the body or person:

- acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
- failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- erred in law in making its decision, whether or not the error appears on the face of the record;
- based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it;
- acted, or failed to act, by reason of fraud or perjured evidence; or
- acted in any other way that was contrary to law.

Applicants who succeed in their leave applications are able to appeal the actual decision on judicial review to the Federal Court of Appeal only if the judge certifies at the time of rendering judgment that a serious question of general importance is involved and states the question.

REMOVALS

People who breach the Act may be issued an order for their removal from Canada. As with the former Act, there are three kinds of removal orders:

Departure orders. These require a person to leave Canada within 30 days, and to confirm their departure with an immigration officer. If they comply, they may return to Canada at any time. If they do not comply, the departure order automatically becomes a deportation order.

Exclusion orders. People who have been removed under an exclusion order may not legally return to Canada for one year unless they have the written permission of an immigration officer. In cases of misrepresentation, the time period is two years.

Deportation orders. These apply to the most serious cases; those removed under a deportation order may not legally return to Canada unless they have the written permission of an immigration officer.

Individuals who do not have status in Canada who make a claim for refugee protection will receive a removal order that will not come into force until their claim is decided. Although some removal orders may be appealed to the Immigration Appeal Division, others may not, including those based on inadmissibility on grounds of security, violating human or international rights, serious criminality or organized criminality. Serious criminality is defined as a crime that carries a maximum term of imprisonment of 10 years and for which the person received a term of imprisonment of at least 2 years.[65]

There is no question that the issue of removals receives a significant amount of public attention. In some cases, removal orders are not executed; in others, there is what is often perceived as an inordinate delay; in still others, people are removed, but later manage to return to Canada. In some situations, the reasons for delays or non-removals are clear and usually understandable:

- a person may make a refugee claim; if it is accepted, the removal order is cancelled;
- other judicial processes may require the person's presence;
- the individual may be in jail;
- appeals may not be exhausted; or
- there may be a temporary moratorium on removals to a country because of dangerous conditions there.

In other situations, delays or non-removals may be harder to explain. People may evade apprehension despite being included in nation-wide data banks. Travel documents may be difficult to obtain from the country to which the person will be removed, a difficulty that may be increased if the person has managed to hide his or her identity or even citizenship. Appeals and judicial reviews may last literally for years in some cases.

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(65) Denying appeal rights for serious criminality is a new feature in the law. Previously, in order to deprive a person of appeal rights on the ground of serious criminality, an opinion was required of the Minister that the person posed a danger.

In addition to the above difficulties, the Standing Committee on Citizenship and Immigration identified another serious problem in a 1998 report – a problem that the Auditor General noted was continuing in 2003.(66) The Committee found that Citizenship and Immigration Canada suffered from a serious lack of data relating to enforcement. This makes it impossible to accurately track people subject to, or potentially subject to, removal. While noting that the modernization of computer systems had begun, the Committee recommended (among numerous other recommendations) that the Department make the development of modern information technology tools to support the enforcement function its highest priority.

In her 2003 Report, the Auditor General noted with concern the increasing gap between the number of removal orders issued and the number of confirmed removals. The gap had grown by some 36,000 in the previous six years, although it was noted that the lack of a confirmation does not necessarily mean that the person remains in Canada.(67) There was also a growing number of removal investigations that had not even been assigned. Moreover, the need for removals is expected to increase in the foreseeable future due to the significant increase in refugee claims in 2002.

The Auditor General also found a gap between the number of unexecuted removal orders and the number of arrest warrants entered into the Field Operations Support System,(68) which links to the police computer system. Without an arrest warrant in the System, immigration officers and police are not alerted to the fact that a given individual should be removed from Canada.

In December 2003, the government announced that the immigration intelligence, interdiction and enforcement functions would be transferred to the new Canada Border Services Agency, which is part of the new Department of Public Safety and Emergency Preparedness. The impact of this reorganization remains to be seen.

Finally, court decisions affect the government's ability to remove people. See, in particular, the *Pushpanathan* case in Appendix 6.

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(66) *Immigration Detention and Removal*, June 1998; 2003 Report of the Auditor General, April, Chapter 5, Citizenship and Immigration Canada – Control and Enforcement.

(67) People may leave voluntarily without reporting their departure. Because Canada does not have exit controls, there is no general mechanism to confirm departures from the country.

(68) The Field Operations Support System is part of Citizenship and Immigration's computer system, which is being progressively modernized.

SECURITY CERTIFICATES

Sections 39-40.1 of the old *Immigration Act* contained provisions for dealing with removal cases involving sensitive material that the government wanted to keep entirely or partly confidential. The Solicitor General and the Minister of Citizenship and Immigration could jointly either sign a certificate or make a report alleging that a person was inadmissible and stating the grounds. The certificate (in the case of a non-permanent resident) would be referred to the Federal Court for review by either the Associate Chief Justice or a designated judge. The certificate could be either upheld or quashed. The report (in the case of a permanent resident) would be referred to the Security Intelligence Review Committee (SIRC), which investigated the grounds upon which it was based, and then reported its findings to the Governor in Council. Cabinet could then direct the Minister to issue a certificate (if in agreement with the report), and the person would become removable. Confidentiality requirements existed for both types of proceeding. The subject of the proceedings could be excluded and would receive only a summary of the evidence.

The new *Immigration and Refugee Protection Act*, most of which came into force in June 2002, eliminated the differences in procedure between permanent residents and non-permanent residents. All certificates are now reviewed by the Federal Court. Thus, the SIRC is no longer automatically involved. Most of the provisions governing the procedure are the same as under the former Act, but a new provision instructs the judge to deal with all matters informally and as expeditiously as is consistent with fairness and natural justice. Also of note is the fact that on 12 December 2003, an Order in Council transferred the signing authority for security certificates from the Minister of Citizenship and Immigration and the Solicitor General to the new Minister of Public Safety and Emergency Preparedness. However, in October 2004, the requirement that the certificate be signed by two ministers was reinstated: the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration.

The constitutionality of the security certificate procedure in the immigration context has been addressed by the Federal Court of Appeal (leave to appeal to the Supreme Court of Canada was denied) in the case of *Ahani* v. *Canada*.[69] The applicant in that case sought a declaration that the process violates section 7 of the Charter, which provides:

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(69) [1996] F.C.J. No. 937 (FCA), affirming the more detailed reasons of McGillis J. of the Trial Division at [1995] 3 F.C. 669, which are available on-line at http://reports.fja.gc.ca/fc/1995/pub/v3/1995fca0153.html.

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The Court held that the procedure is a reasonable balance between the competing interests of the individual and the state. An independent member of the judiciary is able to review the certificate and the supporting evidence, and the person concerned is provided a summary and an opportunity to be heard.

The Supreme Court of Canada addressed a similar procedure in the case of *Canada (MEI)* v. *Chiarelli*, [1992] 1 S.C.R. 711. Mr. Chiarelli faced deportation for his involvement in organized crime, following a report to the SIRC by the Minister of Employment and Immigration and the Solicitor General. The SIRC rules provided that some evidence would not be disclosed to Mr. Chiarelli, such as investigation techniques or police sources. He was given a summary of the evidence against him and an opportunity to respond. Justice Sopinka, writing for a unanimous Court, held that the scope of the principles of fundamental justice in section 7 of the Charter will vary with the context and the interests at stake. Procedural rules are not, therefore, a fixed standard but are to be assessed in a manner that balances the competing interests of the state and the individual. In this particular case, the process was constitutionally sound, as Mr. Chiarelli was made aware of the substance of the allegations against him and was given an opportunity to respond before the SIRC.

It should also be noted that in immigration matters, those who face removal from Canada as a result of the security certificate process have access to a pre-removal risk assessment under the *Immigration and Refugee Protection Act*.[70] In cases where there is evidence of a substantial risk of torture should the person be removed, the *Suresh* decision of the Supreme Court suggests that the Minister will be required to grant a stay of removal in almost all circumstances.[71]

Security certificate provisions are still being challenged in the Courts. Recently, Holocaust denier Ernst Zundel was denied leave to appeal by the Supreme Court of Canada in his challenge to the process. Other proceedings involving people being detained are continuing and involve further constitutional challenges to the security certificate process.

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(70) Sections 97 and 112-114 of the Act allow an application for protection before removal on the grounds that the person faces torture, a risk to his or her life or a risk of cruel and unusual treatment or punishment. The administration of these provisions has been transferred to the Canada Border Services Agency.

(71) *Suresh* v. *Canada (MCI)*, [2002] S.C.C. 1; for a summary of this case, see Appendix 6 of this paper, entitled *Immigration and Refugee Protection Case Law*.

THE ROLE OF THE PROVINCES IN IMMIGRATION

Section 95 of the *Constitution Act, 1867* gives the federal government and the provinces concurrent legislative powers over immigration. The provinces are limited in that any laws they may pass must not be "repugnant to any Act of the Parliament of Canada."

The *Immigration and Refugee Protection Act* contains several provisions relating directly or indirectly to the provinces. One of the objectives of the Act is "to support the development of a strong and prosperous Canadian economy in which the benefits of immigration are shared across Canada." The Act requires the Minister to consult the provinces regarding yearly immigration levels, the distribution of immigrants throughout Canada, and measures to facilitate their integration. The Minister may consult with the provinces on immigration and refugee protection policies so as to facilitate cooperation and be aware of the effect of federal policies on the provinces.

The Act permits the Minister to enter into agreements with the provinces. All provinces except Ontario[72] have entered one or more agreements with the Minister, including the provincial nominee agreements discussed above. The Canada-Quebec Accord, which came into effect in April 1991 (replacing the former Cullen-Couture Agreement), is by far the most extensive.

Under the Accord, Quebec sets its own immigration levels, establishes the financial criteria for sponsors, and selects independent immigrants, for whom Quebec has developed its own points system. Both the federal and provincial grids have many of the same features, with points for age, education, employment experience and so on.

The Quebec grid also contains a number of factors not previously present federally. Spouses can boost Quebec applicants' points by up to 16 depending on their knowledge of French, education, occupation and age. The new federal grid has a potential for a spouse to contribute 10 points to the principal applicant's score. In the Quebec grid, but not federally, there are up to 8 points available for families with children, depending on their ages.

Under the Canada-Quebec Accord, Quebec assumed control of all settlement and integration programs for immigrants destined to that province. Canada agreed to transfer money to Quebec for those programs: $75 million in the initial year (1991-1992), rising to $90 million for 1994-1995. The amount of money is now set by means of a formula, but $90 million is the minimum amount receivable. For 2002-2003, the transfer was $106.7 million.

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(72) Following the change of government in Ontario in October 2003, talks began on a possible agreement.

SETTLEMENT AND INTEGRATION

With a large proportion of immigrants to Canada coming from developing countries and often speaking neither English nor French, services to assist them to settle in and adapt to Canada are an important part of the immigration program. Some of these programs are delivered by Citizenship and Immigration Canada itself, but most are delivered by private sector organizations, funded by the Department.

The Department has also entered into agreements with British Columbia and Manitoba, which have assumed the direct administration and delivery of settlement programs. In the other provinces, the federal government continues to deliver the programs through service provider organizations.(73)

The following is a brief description of current (non-Quebec) settlement programs. The figures provided below are taken from the 2003-2004 *Report on Plans and Priorities*(74) of Citizenship and Immigration Canada. The government also provides some money directly to the provinces to assist them in carrying out their own programs benefiting newcomers.

A. Language Training

An ability to speak one of Canada's official languages is an extremely important part of an immigrant's ability to settle successfully in Canada. Language Instruction for Newcomers to Canada (LINC) is a broadly based program available to all adult immigrants, whether destined to the labour market or not. The classes are made as accessible as possible. Immigrants may attend full-time or part-time for up to three years. Childminding is provided and transportation costs can be covered. Expenditures of $100.4 million are projected for LINC in 2003-2004.

B. Immigrant Settlement and Adaptation Program – ISAP

ISAP provides funding to not-for-profit organizations and educational institutions that offer direct services to immigrants, largely refugees, to enable them to settle in Canada as fast as possible. Services include reception and orientation, paraprofessional counselling,

(73) As noted previously, Quebec is entirely responsible for settlement and integration, with money granted by the federal government for that purpose.

(74) The report may be found at http://www.tbs-sct.gc.ca/est-pre/20032004/CI-CI/CI-CIr34_e.asp#s6x1.

information, translation and interpretation, referral to other community agencies and help with finding employment. ISAP also funds professional development activities for settlement workers, including training and conferences. Expenditures on this program are expected to be approximately $30 million in 2003-2004.

C. Resettlement Assistance Program – RAP

The RAP provides for immediate services, such as reception houses, to government-assisted refugees and humanitarian cases on their arrival, and financial support for up to one year, with support for up to two years available for those with special needs. The need for assistance is assessed by subtracting the individual's basic costs from his or her available income and assets and applying the rates for welfare assistance that apply in that province. Some $47.2 million will be spent on this program in 2003-2004.

D. The Host Program

The Host Program, now available to all immigrants, began as the Host Program for Refugee Settlement. It was an attempt to give government-assisted refugees some of the advantages of the increased social contacts and assistance enjoyed by privately sponsored refugees by matching them to host groups of volunteers in various cities. Studies show that the settlement process is enhanced by such measures, particularly in the area of language skills. In 2003-2004, approximately $2.8 million will be spent on this program.

E. Immigrant Loans Program

This program provides loans to assist sponsored refugees and other protected persons to come to Canada. The regulations set a limit on the loan fund of $110 million. The loan may cover such things as the cost of medical examinations as part of the selection process, and transportation to Canada. Interest is payable on the loans, and the regulations provide a repayment schedule that varies with the amount of the loan.

In addition to the above, CIC funds a program abroad for applicants selected for permanent residence called Canadian Orientation Abroad. Run by an international service-providing organization, the program targets those most in need. The highest priority is government-assisted refugees.

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The Department also provides funds for the Canadian Centre for Victims of Torture and the International Organization for Migration. As well, it is currently exploring the possibility of developing increased Internet access for settlement and integration information.

F. Issues

The settlement and integration of new immigrants raises many important questions. Some of these are briefly reviewed below.

1. Geographic Location

It has been long been the case that immigrants tend to settle disproportionally in Canada's larger centres. The right to take up residence anywhere in Canada is guaranteed to permanent residents by section 6 of the *Canadian Charter of Rights and Freedoms*. The statistics tell the story: close to 60% of all immigrants settle in Ontario, almost 50% in Toronto. Close to 30% settle in Montréal and Vancouver. Moreover, secondary migration, that is, the movement of immigrants within the country, tends to be to British Columbia and Ontario.

Various suggestions have been made over the years as to how to encourage immigrants to settle elsewhere in the country in order to ensure that the benefits of immigration are more evenly distributed, but little progress has been made. As noted, there are hopes that the provincial nominee programs in the various provinces will help provinces that wish to use immigration to help meet their economic and demographic needs. For example, immigration destined to Manitoba has recently risen by 11%; Manitoba has a strong provincial nominee program.

These geographic imbalances have a number of very significant economic and demographic effects on cities, provinces, and Canada as a whole. It is clear that the current immigrant pattern of settlement makes the populations of our large cities, and the provinces in which they are situated, even larger. This in turn tends to increase their economic and political power. Meanwhile, the small provinces stay small and the current imbalance between large and small provinces is accentuated.

Substantial migration to our largest cities also accentuates the existing economic and political power *within* provinces. The mere size of Canada's largest metropolitan areas has increased calls for new arrangements for cities, some of which are home to more people than a number of provinces put together.

Immigration also changes the demographics of an area. Provinces and cities that receive a high proportion of immigrants will be more racially and culturally diverse than those without such influences. High levels of immigration, however, may put pressure on services such as affordable housing, second language training in schools, and employment retraining programs.

Meanwhile, in areas of low immigration, the average age of residents tends to increase as the baby boomers move through their life cycle and are not replaced by immigrants and their families. Population begins to dwindle, fostering a cycle that perpetuates itself.

2. Who Should Deliver Services?

In the mid-1990s, Citizenship and Immigration Canada concluded that the provinces were best placed to administer settlement services. It hoped to enter into agreements with all of the provinces to this effect, accompanied by appropriate funds. One result would have been to reduce the federal-provincial overlap with programs in provinces that receive a large number of immigrants and operate their own settlement programs.

As noted above, the government was successful in reaching agreements only with British Columbia and Manitoba. Elsewhere (excluding Quebec) the federal government continues to administer the programs. Thus, Ontario, which receives almost 60% of all immigrants to Canada, has no settlement agreement; indeed, alone of all the provinces, Ontario has no immigration agreements at all with the federal government, although there are signs that this situation may change in the near future.

3. Recognition of Foreign Credentials and Experience

The best selection system in the world will ultimately be of little benefit to Canada if a significant number of our immigrants are unable to use their education and experience because their credentials, training or experience are not recognized, because inadequate assessment processes are in place, or because suitable upgrading programs have not been developed.

It has been noted, often by independent immigrants themselves, that there is a disconnect between the implicit encouragement they receive from the fact that officers abroad have selected them based on their skills, education and experience (among other factors), and the labour market difficulties many of them experience upon their arrival in Canada.

No one suggests this problem is new, or easy to solve.[75] It has been the subject of a number of studies, and anecdotes about the hardships caused to individuals abound. Immigrants in the past might have been willing to make sacrifices in the hope that their children and grandchildren would prosper, but we should not expect today's highly educated and skilled independent immigrants to do the same. Estimates of the economic value lost by undervaluing the skills of immigrants range as high as $15 billion annually.[76]

The federal government recently recognized these problems in two important initiatives, making commitments in both its Innovation Strategy, launched in February 2002, and in the September 2002 Speech from the Throne. In addition, in December 2003 the new Parliamentary Secretary for Citizenship and Immigration was given special responsibility for foreign credentials. With such a large number of organizations involved, however, the federal government would seem to be largely limited to a partnership and coordinating role, as well as a role in disseminating information as it becomes available.

TEMPORARY RESIDENT VISAS[77]

Temporary residents are people (other than Canadian citizens and permanent residents and certain other specified individuals) who wish to enter Canada for a limited period of time. The category comprises tourists, students and workers. All require a temporary resident visa except those who are exempt under the regulations. The citizens of almost 150 countries require visas to visit Canada or transit the country. Transportation companies can be subject to substantial fines for transporting individuals without the required documents.

Visas are issued upon application at posts abroad, although a visa itself represents only pre-screening by the officer and does not guarantee admittance to the country. The officer at the port of entry takes that decision. Visitors who wish to stay longer than their visa allows may apply for an extension in Canada.

In assessing whether to issue a visa, the officer abroad must form an opinion as to whether the applicant is bona fide and will actually leave the country at the appropriate time. He or she must also screen applicants on security, criminal and health grounds. Certain visitors are

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(75) The regulation of professions and trades is largely a provincial matter, with over 400 organizations involved.

(76) Jeffery Reitz, "Immigrant Skill Utilization in the Canadian Labour Market: Implications of Human Capital Research," *Journal of International Migration and Integration*, March 2002.

(77) Formerly called visitor visas.

required to undergo a medical examination before a visa is issued: visitors for longer than six months, those proceeding from certain designated areas of the world with a higher incidence of communicable disease than Canada, workers whose employment will be of such a nature as to involve the public health, and so on.

There is no question that the temporary resident visa system is intended to function as one of the country's main defences against illegal migration. The visa system is costly to operate and a visa requirement is imposed only when immigration control problems develop in relation to arrivals in Canada from a specific country. Following the events of 11 September 2001, there has also been pressure to coordinate visa requirements with the United States.

Officers abroad normally operate by applying profiles of the kind of individuals not likely, in their view, to be bona fide visitors. For example, an unemployed, single, young male from a developing country may not be successful in his application for a temporary resident visa. In contrast, a well-established businesswoman in her fifties with property in her home country would likely encounter few difficulties.

Such "profiling" is no doubt an essential tool for officers, who must quickly process a great number of these applications (many posts offer same-day service), but it is undeniably a broad brush. Indeed, another word for "profiling" might be "stereotyping" and it can lead to the rejection of bona fide applications. For this reason, the system has been criticized as arbitrary; it may, in fact, prove difficult in individual cases to establish the reasons for rejection of an application. The question of profiling has become particularly sensitive since 11 September 2001 because it has become identified with racial profiling.

The use of temporary resident visas has also been controversial because of its link with the refugee system. The visa system makes no distinction between citizens of those countries producing genuine refugees attempting to flee oppression and those whose citizens are using the refugee system as a convenient way into the country. Advocates for refugees have therefore long been critical of the requirement of visas for citizens of refugee-producing countries. On the other hand, government officials maintain that it is a legitimate government policy to apply visas whenever control problems arise, and to deal with citizens of refugee-producing countries through normal refugee selection procedures abroad and special programs when needed.[78]

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(78) Certain countries in the world, notably Australia and the United States, have a virtually universal visa system, although Australia exempts New Zealand and the United States exempts Canada from the requirement. The U.S. Visa Waiver Program also permits visa-free visitor entry under specific conditions to the nationals of 27 other countries. Canada has resisted the idea of a close-to-universal visa requirement on the grounds of both cost and lack of necessity.

APPENDICES

1. ANNUAL LANDINGS, 1962-2003
2. 2004 IMMIGRATION PLAN
3. GOVERNMENT-ASSISTED AND PRIVATELY SPONSORED REFUGEES (CHOSEN ABROAD), 1990-2002
4. REFUGEE CLAIMS IN CANADA, 1980-2002
5. FEDERAL SKILLED WORKER SELECTION GRID
6. IMMIGRATION AND REFUGEE PROTECTION CASE LAW

APPENDIX 1

ANNUAL LANDINGS, 1962-2003

1962	74,856
1963	93,151
1964	112,606
1965	146,758
1966	194,743
1967	222,876
1968	183,974
1969	164,531
1970	147,713
1971	121,900
1972	122,006
1973	184,200
1974	218,465
1975	187,881
1976	149,429
1977	114,914
1978	86,313
1979	112,093
1980	143,135
1981	128,639
1982	121,176
1983	89,188
1984	88,271
1985	84,334
1986	99,325
1987	151,999
1988	161,494
1989	191,493
1990	216,396
1991	232,744
1992	254,817
1993	256,741
1994	224,364
1995	212,859
1996	226,039
1997	216,014
1998	174,159
1999	189,922
2000	227,346
2001	250,484
2002	229,091
2003 (announced level)	220,000-245,000

Sources: Citizenship and Immigration Canada, *Facts and Figures 2002, Immigration Overview*, Citizenship and Immigration Canada, *Pursuing Canada's Commitment to Immigration*, 2002, Appendix C.

APPENDIX 2

2004 IMMIGRATION PLAN

IMMIGRANT CATEGORY	
ECONOMIC	
▪ Skilled workers and dependants	119,500-135,500
▪ Business	6,000-6,000
▪ Provincial/territorial nominees	3,500-3,500
▪ Live-in caregivers	3,000-3,000
TOTAL ECONOMIC	**132,000-148,000**
FAMILY	
▪ Spouses, partners and children	42,000-42,000
▪ Parents and grandparents	10,500-13,500
TOTAL FAMILY	**52,500-55,500**
TOTAL IMMIGRANTS	**184,500-203,500**
PROTECTED PERSONS	
▪ Government-assisted	7,500-7,500
▪ Privately sponsored	3,400-4,000
▪ Protected persons landed in Canada	14,500-16,500
▪ Dependants abroad of protected persons landed in Canada	4,000-4,800
TOTAL PROTECTED PERSONS	**29,400-32,800**
HUMANITARIAN AND COMPASSIONATE GROUNDS, PUBLIC POLICY CONSIDERATIONS, AND PERMIT HOLDERS	6,100-8,700
TOTAL IMMIGRANTS AND PROTECTED PERSONS	**220,000-245,000**

Source: Citizenship and Immigration Canada, *Annual Report to Parliament on Immigration 2003*, http://www.cic.gc.ca/english/pub/immigration2003.html.

APPENDIX 3

GOVERNMENT-ASSISTED AND PRIVATELY SPONSORED REFUGEES (CHOSEN ABROAD), 1990-2002
(Principal Applicants and Dependants)

Year	Government-Assisted		Privately Sponsored		Total Arrivals
	Level	Actual	Level	Actual	
1990	13,000	12,739	24,000	19,154	31,893
1991	13,000	7,678	23,000	17,368	25,046
1992	13,000	6,259	17,000	8,960	15,219
1993	10,000	6,904	9,000	4,719	11,623
1994	7,300	7,300	6,000	2,700	10,000
1995	7,300	8,194	2,700-3,700	3,249	11,443
1996	7,300	7,871	2,700-4,000	3,066	10,937
1997	7,300	7,662	2,800-4,000	2,593	10,255
1998	7,300	7,382	2,800-4,000	2,140	9,522
1999	7,300	7,444	2,800-4,000	2,330	9,774
2000	7,300	10,666	2,800-4,000	2,924	13,578
2001	7,300	8,697	2,800-4,000	3,575	12,272
2002	7,500	7,504	2,900-4,200	3,055	10,559

Source: Citizenship and Immigration Canada, *Facts and Figures*, various years.

APPENDIX 4

REFUGEE CLAIMS IN CANADA, 1980-2002

Year	Number of Claims	Number of Claims decided by IRB after a hearing	Withdrawn/Abandoned and Others	Positive Decisions by IRB (as % of all claims not abandoned or withdrawn)
1980	1,600			
1981	3,450			
1982	3,300			
1983	6,100			
1984	7,100			
1985	8,400			
1986	18,282			
1987	24,466			
1988	34,353			
1989*	12,092	5,599	133	4,840 (86%)
1990	21,046	13,177	394	10,429 (79%)
1991	29,008	27,520	1,394	19,913 (72%)
1992	31,345	27,600	1,866	17,610 (64%)
1993	35,702	25,868	4,920	14,203 (55%)
1994	22,375	21,928	3,694	15,298 (70%)
1995	26,407	13,755	3,388	9,704 (71%)
1996	26,009	16,715	5,276	9,619 (58%)
1997	22,720	19,086	5,751	10,038 (53%)
1998	23,904	23,183	6,212	12,929 (56%)
1999	29,450	22,373	5,609	12,984 (58%)
2000	34,283	24,208	4,709	14,002 (58%)
2001	43,891	22,964	5,468	13,387 (58%)
2002	39,495	26,349	6,341	15,228 (58%)

Sources: Compiled from: Immigration and Refugee Board (IRB), *CRDD Refugee Status Determinations, Calendar Year*, supplied to author.

* Number of claims referred to the IRB from 1989 on.

NOTE: There are two different methods of calculating the recognition rate of Convention refugees, and they produce distinctly different results. The above calculation subtracts the number of withdrawn, abandoned, or other claims in calculating the recognition rate. This is thought to provide a more accurate picture of the recognition rate of serious claims, that is, those that actually went to a hearing. Many claimants file a claim and then disappear. It may be thought misleading to treat those claims as negative decisions.

In contrast, the Board includes withdrawn, abandoned and other claims in computing its recognition rate. The Board's recognition rates, using this method, are as follows:

1989 – 84%
1990 – 77%
1991 – 69%
1992 – 60%
1993 – 46%
1994 – 60%
1995 – 57%
1996 – 44%
1997 – 40%
1998 – 44%
1999 – 46%
2000 – 48%
2001 – 47%
2002 – 47%

APPENDIX 5

FEDERAL SKILLED WORKER SELECTION GRID
GRILLE DE SÉLECTION DES TRAVAILLEURS QUALIFIÉS (FÉDÉRAL)

EDUCATION/ÉTUDES	Maximum 25
University Degrees/ Diplômes universitaires	
Ph.D., or Masters *AND* at least 17 years of completed full-time or full-time equivalent study/ Doctorat, ou maîtrise *ET* au moins 17 années d'études à temps plein complètes ou l'équivalent temps plein	**25**
Two or more university degrees at the Bachelor's level *AND* at least 15 years of completed full-time or full-time equivalent study/ Deux diplômes universitaires ou plus au niveau du baccalauréat *ET* au moins 15 années d'études complètes à temps plein ou l'équivalent temps plein	**22**
A two year university degree *AND* at least 14 years of completed full-time or full-time equivalent study/ Un diplôme universitaire obtenu après deux années d'études *ET* au moins 14 années d'études à temps plein complètes ou l'équivalent temps plein	**20**
A one year university degree *AND* at least 13 years of completed full-time or full-time equivalent study/ Un diplôme universitaire obtenu après une année d'études *ET* au moins 13 années d'études à temps plein complètes ou l'équivalent temps plein	**15**
Trade or non-university certificate or diploma/ Certificat ou diplôme de compétence non-universitaire	
A three year diploma, trade certificate or apprenticeship[1] *AND* at least 15 years of completed full-time or full-time equivalent study/ Un diplôme, certificat de compétence ou d'apprentissage[1] reçu après trois années *ET* au moins 15 années d'études à temps plein complètes ou l'équivalent temps plein	**22**
A two year diploma, trade certificate or apprenticeship *AND* at least 14 years of completed full-time or full-time equivalent study/ Un diplôme, certificat de compétence ou d'apprentissage obtenu après deux année *ET* au moins 14 années d'études à temps plein complètes ou l'équivalent temps plein	**20**
A one year diploma, trade certificate or apprenticeship *AND* at least 13 years of completed full-time or full-time equivalent study/ Un diplôme, certificat de compétence ou d'apprentissage obtenu après une année *ET* au moins 13 années d'études à temps plein complètes ou l'équivalent temps plein	**15**
A one year diploma, trade certificate or apprenticeship *AND* at least 12 years of completed full-time or full-time equivalent study/ Un diplôme, certificat de compétence ou d'apprentissage obtenu après une année *ET* au moins 12 années d'études à temps plein complètes ou l'équivalent temps plein	**12**

EDUCATION/ÉTUDES	Maximum 25
High School Diploma/ Diplôme d'études secondaires	
Secondary School educational credential/ Diplôme d'études secondaires	5

OFFICIAL LANGUAGES/LANGUES OFFICIELLES		Maximum 24
1st Official language/ 1er langue officielle	High proficiency (per ability)(2)/ Bonne connaissance (par aptitude(2))	4
	Moderate proficiency (per ability)/ Connaissance moyenne (par aptitude)	2
	Basic proficiency (per ability)/ Connaissance de base (par aptitude)	1 to maximum of 2/ de 1 à 2
	No proficiency/Connaissance nulle	0
	Possible maximum (all 4 abilities)/ Maximum possible (pour les 4 aptitudes)	16
2nd Official language/ 2e langue officielle	High proficiency (per ability)/ Bonne connaissance (par aptitude)	2
	Moderate proficiency (per ability)/ Connaissance moyenne (par aptitude)	2
	Basic proficiency (per ability)/ Connaissance de base (par aptitude)	1 to maximum of 2/ de 1 à 2
	No proficiency/Connaissance nulle	0
	Possible maximum (all 4 abilities)/ Maximum possible (pour les 4 aptitudes)	8

EXPERIENCE/EXPÉRIENCE	Maximum 21
1 year/Une année	15
2 years/Deux années	17
3 years/Trois années	19
4 years/Quatre années	21

AGE/ÂGE	Maximum 10
21-49 years at time of application/ 21-49 ans au moment de la présentation de la demande	**10**
Less 2 points for each year over 49 or under 21/ 2 points de moins pour chaque année au-dessus de 49 ou en-dessous de 21	

ARRANGED EMPLOYMENT IN CANADA/ EMPLOI RÉSERVÉ AU CANADA	Maximum 10
HRDC confirmed permanent offer of employment Offre d'emploi à durée indéterminée approuvée par DRHC	**10**
Applicants from within Canada and holding a temporary work permit that is: Demande présentée au Canada par le titulaire d'un permis de travail temporaire qui :	
HRDC opinion obtained, including sectoral confirmations A fait l'objet d'un avis par DRHC, incluant les approbations sectorielles	**10**
HRDC opinion exempt under NAFTA, GATS, CCFTA, or significant economic benefit (i.e., intra-company transferee) Fait l'objet d'une dispense d'avis de DRHC en vertu de l'ALENA, de l'AGCS ou de l'ALECC ou pour motif d'effets économiques importants (mutation interne)	**10**

ADAPTABILITY/CAPACITÉ D'ADAPTATION	Maximum 10
Spouse's/common-law partner's education/ Études de l'époux ou du conjoint de fait	**3-5**
Minimum one year full-time authorized work in Canada[(3)]/ Au moins une année d'emploi à plein temps au Canada en vertu d'un permis de travail[(3)]	**5**
Minimum two year full-time authorized post-secondary study in Canada[(3)]/ Au moins deux années d'études post secondaires à plein temps au Canada en vertu d'un permis d'études[(3)]	**5**

ADAPTABILITY/CAPACITÉ D'ADAPTATION	Maximum 10
Have received points under the Arranged Employment in Canada factor/ Points attribués pour un emploi réservé au Canada	5
Family relationship in Canada(3)/ Parenté au Canada(3)	5

TOTAL PASS MARK	Maximum 100 67*

(1) "Diploma, trade certificate or apprenticeship" refers to a post-secondary educational credential other than a university educational credential.
(1) « Diplôme, certificat de compétence ou d'apprentissage » réfère à un diplôme d'études post secondaires autre qu'un diplôme universitaire.
(2) Applicants are rated on the ability to speak, listen, read or write Canada's two official languages.
(2) Le candidat est évalué sur les aptitudes suivantes : parler, comprendre, lire ou écrire les deux langues officielles du Canada.
(3) Applies to either principal applicant or accompanying spouse or common-law partner.
(3) S'applique tant au demandeur principal qu'à son époux ou conjoint de fait qui l'accompagne.

* From 28 June 2002 to 18 September 2003, the pass mark was 75.

APPENDIX 6

IMMIGRATION AND REFUGEE PROTECTION CASE LAW

The following are summaries of some of the leading cases in this area of law. The volume of immigration litigation in Canada is quite large, and thus reference is made only to the most significant decisions.

***Singh et al.* v. *Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177**

The Minister of Employment and Immigration, acting on the advice of the Refugee Status Advisory Committee (RSAC),[1] determined that a group of claimants were not Convention refugees. The Immigration Appeal Board denied the subsequent applications for redetermination of status without an oral hearing, as was the law at the time. At issue was whether the appellants could rely on the *Canadian Charter of Rights and Freedoms* to challenge the process and, if so, whether their right to security of the person was being infringed in a manner that did not accord with the principles of fundamental justice. The majority held:

- Section 7 of the Charter guarantees "everyone … the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The term "everyone" includes every person physically present in Canada and by virtue of such presence amenable to Canadian law.

- A Convention refugee had the right under s. 55 of the *Immigration Act, 1976* not to "… be removed from Canada to a country where his life or freedom would be threatened …" The denial of such a right was held to amount to a deprivation of "security of the person" within the meaning of section 7.

- The procedure for determining refugee status claims established in the *Immigration Act, 1976* was found to be inconsistent with the requirements of fundamental justice. At a minimum, the procedural scheme set up by the Act should have provided the refugee claimant with an adequate opportunity to state his case and to know the case he had to meet. However, the process did not envisage an opportunity for the refugee claimant to be heard other than through the transcript of his examination under oath by an immigration officer, and the claimant was not given an opportunity to comment on the advice the Refugee Status Advisory Committee had given the Minister. Under the Act, the Immigration Appeal Board was required to reject an application for redetermination unless it was of the opinion that it was more likely than not that the applicant would be able to succeed. An application, therefore, would usually be rejected before the refugee claimant even had an opportunity to discover the Minister's case against him in the context of a hearing.

- The government did not demonstrate that these procedures were a reasonable limit on claimants' rights within the meaning of s. 1 of the Charter.

It was the *Singh* decision that led to the creation of the Immigration and Refugee Board (IRB).

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(1) The RSAC was the body preceding the Immigration and Refugee Board that read transcripts of claimant interviews and made recommendations to the Minister.

***Canada (Attorney General)* v. *Ward*, [1993] 2 S.C.R. 689**

Mr. Ward was a former member of a Northern Ireland terrorist organization who had been sentenced to death by that organization for assisting hostages to escape. He made a claim to refugee status in Canada, arguing that the United Kingdom and Ireland could not protect him. The Supreme Court looked at various legal issues relating to the definition of a Convention refugee in this landmark case and held as follows:

- "Persecution" includes situations where the state is not an accomplice to the persecution but is simply unable to protect its citizens. The claimant must provide clear and convincing confirmation of a state's inability to protect, absent an admission by the national's state of its inability to protect that national. Except in situations of complete breakdown of the state apparatus, it should be assumed that the state is capable of protecting a claimant.

- In determining that Mr. Ward did not belong to a "particular social group" (one of the enumerated grounds in the definition of a Convention refugee), this basis of persecution was determined to consist of three categories: (1) groups defined by an innate, unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence.

- Mr. Ward, who believed that the killing of innocent people to achieve political change was unacceptable, set the hostages free in accordance with his conscience. The persecution he feared thus stemmed from his political opinion as manifested by this act.

The case was returned to the Board for rehearing in accordance with the Court's guidance. Ward was ultimately returned to the United Kingdom.

***Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982**

Mr. Pushpanathan entered Canada and claimed refugee status, but his claim was never adjudicated as he was granted permanent resident status under an administrative program. He was subsequently convicted of conspiracy to traffic in a narcotic, having been a member of a group in possession of heroin with a street value of some $10 million. He was sentenced to eight years in prison. In 1991, when on parole and facing deportation, Mr. Pushpanathan renewed his claim for Convention refugee status. The Board decided that he was not a refugee by virtue of the exclusion clause in Article 1F(c) of the Convention, which provides that the Convention does not apply to a person who "has been guilty of acts contrary to the purposes and principles of the United Nations."

The majority of the Supreme Court of Canada found that the Board's decision was incorrect and allowed Mr. Pushpanathan's appeal. Article 1F(c), the Court determined, will be applicable where there is consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution, or are explicitly recognized as contrary to the UN purposes and principles. Conspiring to traffic in a narcotic is thus not a violation of Article 1F(c).

The matter was remitted to the IRB for reconsideration, where a new argument was advanced against the claimant. It was suggested that Mr. Pushpanathan was ineligible to have his claim heard under Article 1F(c) because his drug trafficking was intended to profit a terrorist group, the Tamil Tigers.(2) Although he denied any knowledge that funds from the drug ring were being sent to the Tigers, the Board held that he was ineligible to have his claim heard. The Federal Court upheld that decision in October 2002, stating that the test for determining whether there is "a serious reason for considering" (the term used in the Refugee Convention) that a person has been guilty of acts that the Supreme Court would consider sufficient to meet the Article 1F(c) exclusion requires a low standard of proof. Formal membership in the terrorist organization or direct involvement is not required.

***Suresh* v. *Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1**

Suresh, and its companion case *Ahani* (see below), dealt with deportation orders against individuals who argued that they would face torture if returned to their home countries. Canada has ratified the *Convention Against Torture* (CAT), which explicitly prohibits state parties from returning people to torture. Article 3(1) states: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." States are not supposed to be able to deviate from this absolute prohibition. Article 2(2) of the CAT reads: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." Furthermore, the Supreme Court of Canada unanimously held when examining the issue that the prohibition on returning a person to face a risk of torture is also the prevailing international norm; that is, it is customary international law.

In direct contradiction, however, was a section of the former *Immigration Act* which permitted deportation to a country where the person's life would be threatened if the person was inadmissible for any specified reason and was designated to be a danger to the security of Canada. (This continues to be the case under the new *Immigration and Refugee Protection Act*, which came into force on 28 June 2002.) In essence, Canadian law provides that in certain situations, people may be deported to face torture.

Mr. Suresh was allegedly a member of and fundraiser for the Tamil Tigers. Although the Court allowed Suresh's appeal and ordered that he was entitled to a new deportation hearing, the legislation was upheld as valid. The principles of fundamental justice in section 7 of the Charter would guide the new hearing and the Court suggested that the Minister should "generally decline to deport refugees where on the evidence there is a substantial risk of torture." The Court set out its restrictive view of when deportation under these circumstances could take place as follows:

> We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s.7 of the Charter or under s.1.... Insofar as Canada is unable to deport a person where there are substantial grounds to believe that he or she would be tortured on return, this is not because Article 3 of the CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under s.7 of the Charter generally precludes deportation to torture on a case-by-case basis.

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(2) The Liberation Tigers of Tamil Eelam is an organization involved in terrorist activity in the course of its war for an independent Tamil state in Sri Lanka.

***Ahani* v. *Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2**

In the companion case to *Suresh* (see above), the appellant was allegedly an assassin, trained by Iranian intelligence. In his case, the Court determined that he had not established that he faced a substantial risk of torture if returned to Iran. His appeal was therefore dismissed.

Following the judgment, Mr. Ahani began new proceedings, requesting that his deportation be stayed until the United Nations Human Rights Committee reviewed his case. He was unsuccessful in the lower courts and the Supreme Court of Canada refused to hear his appeal. He was removed from Canada.

***Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817**

Ms. Baker, a woman with Canadian-born dependent children, was facing deportation. She submitted a written application to stay in Canada on humanitarian and compassionate grounds. A senior immigration officer refused the application. Statements in the officer's notes gave the impression that he may have been drawing conclusions based not on the evidence before him, but on the fact that the appellant was a single mother with several children and had been diagnosed with a psychiatric illness. The majority of the Court held:

- A reasonable and well-informed member of the community would conclude that the reviewing officer had not approached this case with the appropriate impartiality, thus giving rise to a reasonable apprehension of bias.

- The wording of the legislation showed Parliament's intention that the decision be made in a humanitarian and compassionate manner. A reasonable exercise of the power conferred by the section required close attention to the interests and needs of children, since children's rights are central values in Canadian society. Because the reasons for this decision did not indicate that it was made in a manner that was sensitive to the interests of the Baker children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation.

The case was remitted for reconsideration and Ms. Baker was ultimately granted permanent resident status.

***Ribic* v. *Canada (Minister of Employment and Immigration)*, (20 Aug. 1985), I.A.B. T84-9623**

Permanent residents facing deportation under the former Act could apply to the Immigration Appeal Division of the IRB for an order staying or quashing their removal order on the ground that, "having regard to all the circumstances of the case, the person should not be removed from Canada."[3] Circumstances considered at these hearings were enumerated in the *Ribic* decision and include:

- The seriousness of the offence;
- The possibility of rehabilitation;
- The length of time spent in Canada and the degree to which the appellant is established here;

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(3) Note that the new *Immigration and Refugee Protection Act* has a similar provision for considering humanitarian concerns when a permanent resident is facing deportation, although there are new restrictions on who may access the Immigration Appeal Division.

- The appellant's family in Canada and the dislocation to the family that deportation would cause;
- The support available to the appellant, not only within the family but within the community; and
- The degree of hardship that would be caused to the appellant by his/her return to the country of nationality.

***Chieu* v. *Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84**

In 1991, Mr. Chieu's sister sponsored him, as well as other family members, to come to Canada. On his application for permanent residence, he misrepresented his marital status, stating he was single with no dependants, in order to be eligible to be sponsored as an accompanying dependant of his father. Once in Canada, he applied to sponsor his previously undisclosed wife and child. As a result, an immigration inquiry was convened and he was ordered deported for misrepresentation. An appeal to the Immigration Appeal Division on humanitarian grounds was denied. The Board held that it could not consider potential foreign hardship, one of the *Ribic* factors (see above).

The Supreme Court of Canada held that the factors set out in *Ribic* remain the proper ones for the Appeal Division to consider. The Board is thus obliged to consider every relevant circumstance, including potential foreign hardship, provided that the likely country of removal has been established by the individual facing removal. As this had not been established by Mr. Chieu, the matter was remitted to the Board for a rehearing.

***Law Society of British Columbia* v. *Mangat*, [2001] 3 S.C.R. 113**

Mr. Mangat was an immigration consultant in Vancouver. Although he was not a member of the British Columbia bar, he and other employees of his firm acted as counsel in various immigration proceedings. The Law Society of British Columbia brought an application seeking a permanent injunction against Mr. Mangat and his associates to prevent them from engaging in the practice of law in contravention of the B.C. *Legal Profession Act*. The consultants conceded that they were engaged in the practice of law within the meaning of the provincial *Legal Profession Act*, but contended that they were permitted to do so under the former *Immigration Act*, which allowed (as does the new Act) non-lawyers to appear on behalf of clients before the IRB.

The Supreme Court of Canada determined that since the subject matter of the representation of people by counsel before the IRB has federal and provincial aspects, the federal and provincial statutes and rules or regulations will coexist insofar as there is no conflict. Where there is a conflict, the federal legislation will prevail according to the paramountcy doctrine, thus safeguarding the control by Parliament over the administrative tribunals it creates.

Non-lawyers may therefore appear before the IRB (although by the time the case reached the Supreme Court of Canada, Mr. Mangat had completed law school and become a member of the Bar).